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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

NBD,

Plaintiff and Appellant,

v.

CITY OF NEWARK,

Defendant and Respondent.

A132198

(Alameda County
Super. Ct. No. HG10523273)

Plaintiff NBD was fined by the City of Newark (City) for illegally operating a medical marijuana dispensary. NBD appealed the fine to the superior court, and its appeal was dismissed for failure to exhaust administrative remedies. NBD argues that the court erred in dismissing the action on the grounds that it had failed to exhaust. At the oral argument of this appeal, respondent advised this court that NBD's corporate status was suspended by the Secretary of State. This court afforded NBD 20 days to provide supplemental briefing on whether it would revive its corporate status. NBD's briefing does not state that it has revived its corporate status or unequivocally that it intends to do so. Accordingly, NBD does not have standing to sue and this appeal will be dismissed.

I. BACKGROUND

NBD is a nonprofit mutual benefit corporation formed "to collectively or cooperatively cultivate and distribute cannabis for medical purposes." NBD was told by the City at a meeting on December 16, 2009 that the dispensary it intended to open was not a use authorized in the zoning district where it was to be located. The next day,

NBD's counsel wrote a letter to the City Attorney reporting that the dispensary had opened for business. On December 22, 2009, the City sent a letter to NBD's landlord advising that the dispensary was not an authorized use, and noting that "an administrative process exists for the addition of unlisted uses." The letter warned that the City was preparing a nuisance abatement notice, which could result in imposition of civil penalties of up to \$1,000 per day. The City forwarded a copy of the letter to NBD the next day.

The City issued a nuisance abatement notice to NBD in February 2010, and a hearing on the notice was held in May. The administrative hearing officer determined that the use was impermissible, and ordered NBD to pay an administrative penalty of \$48,500, plus one-half of the City's enforcement costs, which totaled \$1,051.18.

NBD appealed the imposition of the fine to the trial court on July 1, 2010. When the case was argued on November 12, 2010, counsel for the City maintained that NBD failed to exhaust its administrative remedies because "they did not take [the city's determination that the use was not permitted] up to the Planning Commission and the [City] Council" — apparently referring to NBD's failure to take one of the three steps NBD was advised were possible bases to seek review of the City's position mentioned at the December 16 meeting.

The court filed a statement of decision on November 17 that agreed with the City and concluded that NBD had failed to exhaust its administrative remedies because it did not "appeal the initial determination of [the City's] staff . . . to the City Planning Commission and, if necessary, ultimately to the City Council." NBD objected to the statement of decision, arguing that the court was wrong to conclude that NBD had failed to exhaust administrative remedies.

At the March 23, 2011 hearing on the objections, the court told NBD's counsel that while "you didn't exhaust your administrative remedies[,] I can certainly stay the payment of the fine until you go through that process and then bring it properly up." NBD's counsel responded by saying, "If the court is inviting us to stay this so that we can go through a process with the City of Newark, I will take that." The court did not "think that [NBD] should, in fact, have to pay the fine if it is going to proceed with an appeal to

the City Council. . . . If [NBD] is not prepared to pursue that course, then . . . they should have to pay the fine.” Counsel for NBD replied, “I am prepared to pursue that course. And if the court’s prepared to issue a stay order as to the need to pay money, I make that application before the court at this time.”

Counsel for the City asked for “a time limit for [NBD] to begin that procedure, because they are perfectly happy staying open forever.” The court responded, “It seems to me that’s a fair point. I am going to require your client, if you want this, to file the necessary application with the City so the City can formally take action on it not later 30 days from today’s date.” NBD’s counsel stated, “We will file the paperwork within 30 days and file some sort of notice to the court advising the court we did so.” The court said, “And then at that point you can . . . fight it out in front of the City Council. And once that’s been done . . . if in fact the City Council disagrees with the . . . administrative hearing officer,” then “you don’t need to come back [to court].”

Counsel for the City asked the court whether it intended to retain jurisdiction and keep the case open while NBD exhausted its administrative remedies. The court said, “[s]eems to me that I am [retaining jurisdiction],” but “that’s a[n] off-the-cuff comment.” The court said that it could not answer counsel’s question because it had not researched the point.

On April 22, NBD filed a “Status Statement” indicating that it was pursuing its administrative remedies. NBD reported that it “has prepared a number of applications to the City . . . including a Conditional Use Permit Application. [¶] . . . A Conditional Use Permit will be filed Monday AM.”

On April 29, the court filed the order of dismissal from which this appeal is taken. The order reads: “The court on its own motion orders the dismissal of the complaint without prejudice for failure by plaintiff NBD . . . to exhaust administrative remedies consistent with the court’s Statement of Decision dated 11/17/2010.” NBD appealed.

At oral argument in this appeal on September 11, 2012, the City advised the court that NBD’s corporate status had been suspended by the California Secretary of State. The court afforded the parties 20 days to brief the significance of the suspension, and

specifically requested NBD to advise the court whether it intended to revive its corporate status. On September 28th, NBD filed its supplemental brief. It argues that an objection to a corporation's ability to sue is a plea in abatement that is disfavored, and that courts normally afford a corporation "a short continuance in order to enable the suspended corporation to effect reinstatement." NBD's position is that "it should be given time to obtain reviver. This Court should proceed to make its decision on appeal (which [it] appears it is otherwise ready to do), and allow the Respondent to file its motion to dismiss before the trial court."

II. DISCUSSION

"A corporation that fails to pay its taxes, or fails to file a required return, or fails to file the required statement of information may be suspended and its corporate powers will be forfeited while under suspension. . . . In cases involving the suspension of a corporation as a result of the failure to pay taxes and fees, courts have consistently held that while the corporation's powers are suspended, it lacks standing to sue and statutes of limitations are not tolled. . . . The same rule applies when a corporation fails to file the required statement of information." (*Friends of Shingle Springs Interchange, Inc. v. County of El Dorado* (2011) 200 Cal.App.4th 1470, 1486.)

Due to its status as a suspended corporation, NBD lacks standing to pursue this appeal. At oral argument before this court, NBD was afforded just the opportunity it now seeks, a brief pause in the proceedings to effectuate reviver of its corporate status. Instead of attempting reviver and advising this court of the status of its efforts, NBD's supplemental brief makes a legal argument that challenging a corporation's ability to sue is a plea in abatement that is disfavored. It then requests the court to issue its decision in this case, saying that respondent may challenge its corporate status back in the trial court. NBD's request appears premised on an assumption that the outcome of this appeal will necessitate further litigation in the trial court. This can only be conjecture.

In light of appellant NBD's status as a suspended corporation, it lacks standing to prosecute this appeal.

III. DISPOSITION

This appeal is dismissed.

Siggins, J.

We concur:

Pollak, Acting P.J.

Jenkins, J.